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Wyoming State Parks & Cultural Resources

State Historic Preservation Office
Barrett Building, 3rd Floor
2301 Central Avenue
Cheyenne, WY 82002
Phone: (307) 777-7697
Fax: (307) 777-6421
<http://wyoshpo.state.wy.us>

March 23, 2010

Victoria Rutson, Section of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

re: Dakota, Minnesota & Eastern Railroad Corporation Construction into the Powder River Basin. Additional Correspondence Concerning the Request for Review and Comment on 21 Archaeological Sites. Finance Docket No. 33407 (SHPO File # 0498RLC044)

Dear Ms. Rutson:

Thank you for consulting with the Wyoming State Historic Preservation Office (SHPO) regarding the above referenced project. We have received your letter of March 2, 2010 and wish to thank you for your commitment to reformat the above referenced report to meet Wyoming standards. However, it appears that we still have some disagreement regarding interpretation of the PA for this project.

In your letter you indicate that the Visual Effects Assessment and the Deeply Buried Sites Proposal "are not classified as survey reports". And that these documents "were not anticipated and were not discussed in the PA". And thus were not subject to the review time frames outlined in the PA. We strongly disagree with this assertion. Per the PA, Attachment A, Stipulation 3.4.5 (emphasis added, in part):

"A geomorphological survey of the construction ROW will be conducted to identify areas where buried cultural resources may exist and where **deep testing may be necessary to identify cultural resources.**"

Therefore, the Deeply Buried Sites Proposal is actually part of the Geomorphological survey specified, and anticipated, in the PA. As such, it is subject to the review times outlined in the PA.

Additionally, the Visual Effects Assessment is a direct product of two different stipulations in the PA. Particularly, Attachment A, Stipulation 3.4.1, which stipulates identification of known sites through records searches, and Attachment A, Stipulation 3.4.6, which stipulates (in part):

"A reconnaissance level survey of those areas outside the ground disturbance area where there is the potential for the undertaking to have an adverse effect, as defined in 36 CFR Part 800.5, on historic properties."



Dave Freudenthal, Governor
Milward Simpson, Director

It is our assertion, that since the STB has not undertaken an on the ground reconnaissance level survey, that it is fulfilling this stipulation by combining these two stipulations into the Visual Effects Assessment. And that this survey is therefore defined, and anticipated, within the PA and subject to the review timeframes stipulated in the PA. If we are mistaken on this interpretation we look forward to consulting further with your office (as well as the "THPO/cultural resource representative designated by the tribes, DM&E, and other identified consulting parties, and Federal agencies", as defined in Attachment A, Stipulation 3.4.6) to define the areas that will be subject to the on the ground reconnaissance survey.

Regarding the Formatting of the January 6, 2010 letter. It is our contention that the results of Native American consultation are a vital part of the identification and evaluation efforts required under Attachment A, Stipulation 3.4. of the PA. The fact that this information was not included in the original survey report only indicates that the original survey report was incomplete, not that the subsequent documentation does not need to meet the required format.

The issue regarding the confidentiality of tribal information is troubling to our office on several levels. First, maintaining the security of sensitive information concerning cultural resource is a vital concern to our office, and one that we perform successfully on a daily basis. Additionally, our office is the official repository of records for ALL cultural resources within the State of Wyoming. We are also concerned that without this information, the potential for future projects to destroy culturally significant resources is heightened. Additionally, the commitment to confidentiality was further strengthened within the PA, Stipulation I, and again in Attachment A, Page A-14, in consultation with all signatories and invited parties, which reads (emphasis added):

"All signatories and invited Signatories shall insure that shared data, including data concerning the precise location and nature of historic properties **and properties of religious and cultural significance** are protected from public disclosure to the greatest extent permitted by law, including conformance to Section 304 of the NHPA, as amended and Section 9 of the ARPA and Executive Order on Sacred Sites 13007 FR 61-104 dated May 24, 1996."

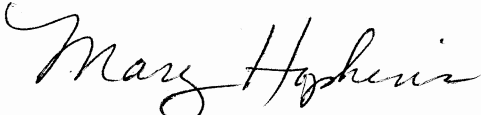
And finally, as negotiated in the PA, the STB in consultation with all signatories and invited parties (including tribes) committed to provide our office with complete site forms [Attachment A, Stipulation 5, Part 2.9, Appendix(s)]. But now the STB has negotiated recordation standards for cultural resources within the State of Wyoming, without consulting the State of Wyoming (and contrary to the terms of the PA). We find this unacceptable and question the STB's legal authority to do so. We recommend that our offices sit down with the concerned tribe(s) to discuss this matter. We are confident that we can address any concerns that the tribes may have concerning the security of this data.



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Please refer to SHPO project #0498RLC044 on any future correspondence regarding this project.
If you have any questions, please contact me at 307-777-6311.

Sincerely,



Mary Hopkins
Interim State Historic Preservation Officer

Cc: Reid Nelson, Director, Office of Federal Agency Programs
Advisory Council on Historic Preservation
Najah Duvall-Gabriel, Advisory Council on Historic Preservation
Sara Needles, Division Administrator, Cultural Resources
Mr. Russell Eagle Bear, THPO, Rosebud Sioux Tribe



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